IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 8, 2006

STATE OF TENNESSEE v. TRACIE ANN HINSON

Direct Appeal from the Criminal Court for Davidson County
No. 2005-A-478 Steve Dozier, Judge

No. M2005-02853-CCA-R3-CD - Filed September 27, 2006

The appellant, Tracie Ann Hinson, pled guilty in the Davidson County Criminal Court to theft of property valued ten thousand dollars or more but less than sixty thousand dollars, a Class C felony, and agreed to a six-year sentence as a Range II offender with the manner of service to be determined by the trial court. After a sentencing hearing, the trial court ordered that she serve her sentence in confinement and consecutively to other sentences in Michigan. On appeal, the appellant claims that she should have received an alternative sentence of split confinement and concurrent sentencing. Upon review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and J.C. MCLIN, JJ., joined.

Emma Rae Tennent (on appeal) and Kyle Mothershead (at trial), Nashville, Tennessee, for the appellant, Tracie Ann Hinson.

Paul G. Summers, Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Amy Eisenbeck and Rachel Sobrero, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

At the appellant's August 2005 guilty plea hearing, the State presented the following factual account of the crime: In November 2001, the appellant worked as an accountant for Kistler McDougall Corporation. One day, the appellant failed to show up for work, and worried coworkers telephoned the police. When the police arrived at the appellant's home, she told them she was having personal problems. The next day, the appellant telephoned Tom Newhouse, Kistler

McDougall's Chief Financial Officer, and told him that he should hire someone to replace her. Newhouse hired a replacement, and the new accountant could not find the company's bank statements. Soon after, the bank began returning forged checks to Kistler McDougall. A total of nineteen checks were stolen and forged, totaling over twenty-eight thousand dollars. Newhouse later discovered that additional money was missing.

At the appellant's sentencing hearing, Newhouse testified that he hired the appellant as an accountant for one of Kistler McDougall's subsidiaries and that she did a very good job. The appellant worked for seven or eight months and quit abruptly. After the appellant quit her job, the company received a bank statement that included checks made out to the appellant with Newhouse's forged signature. Newhouse stated that as a security measure, all company checks written for more than five thousand dollars were required to have two signatures but that all of the forged checks made out to the appellant were written for amounts less than five thousand dollars. After receiving the returned checks, Newhouse telephoned the police and filed a report. Ultimately, he discovered that the appellant had stolen over eighty thousand dollars from the company. The appellant did not return any of the money, but Kistler McDougall's insurance company reimbursed the total amount. Newhouse stated that the appellant deserved to spend some time in jail and advised the trial court that two hundred fifty Kistler McDougall employees were "looking at what you are gonna do today; and you are as good a deterrent as anything against people stealing from our company." On cross-examination, Newhouse testified that the appellant began working for Kistler McDougall in May 2001 and began embezzling from the company in June 2001. During her employment, Newhouse gave the appellant some payroll advances because she needed money.

Judi Liscombe, the appellant's mother, testified that the appellant was a very intelligent child and did well in school. Liscombe was a single parent with two children, and she worked two to three jobs. When the appellant was a teenager, the appellant and Liscombe had conflicts, and Liscombe sent the appellant to live with the appellant's father. The appellant's father was an alcoholic, and living with him "was very rough on Tracie." The appellant graduated from college with a degree in management and accounting, worked in Michigan, and always had good jobs. At some point, the appellant telephoned Liscombe from Mississippi and told her that she was in jail. Liscombe stated that she had seen changes in the appellant and that she believed the appellant had rehabilitated herself. The appellant's family loved her, and the appellant would continue to receive therapy. Two of the appellant's uncles owned businesses and would hire the appellant if the trial court were to place her on probation. Upon questioning by the trial court, Liscombe acknowledged that in 2000, the appellant had seen a Michigan psychologist for help with a gambling problem.

Gary Liscombe, the appellant's stepfather, testified that he had known the appellant for five years. He learned the appellant had charges pending against her in Michigan and Tennessee, visited the appellant at her brother's home, and took her to a police department in Wixom, Michigan. The appellant turned herself in to a police detective and served several years in confinement in Michigan. Liscombe stated that he had talked with the appellant and that "she's well aware of what she's done." The appellant's family supported her, and Liscombe did not believe the appellant would repeat her

crimes. Liscombe stated that the appellant was intelligent and would be an asset to her community. He described the appellant's actions as "heartbreaking" and apologized to Kistler McDougall.

The appellant testified that she had a gambling addiction and stole from Kistler McDougall in order to support her gambling habit. She said that Tom Newhouse trusted her and that she took advantage of her accounting position "in order to go to the casino as much as I possibly could." The appellant said she was greedy and selfish, wrote checks to herself, and cashed them. The appellant was sorry and did not understand why she allowed herself to steal the money. In September 2003, while the appellant was serving a two- to fourteen-year prison sentence in Michigan, she notified the Michigan Prison Records Department that charges were pending against her in Tennessee. The appellant wanted to return to Tennessee and face the charges against her. The appellant testified that since she has been in prison, she has worked hard to improve herself and has attended Alcoholic Anonymous (AA) meetings. Although the appellant is not an alcoholic, the prison does not offer Gamblers Anonymous meetings, and AA meetings provide a helpful twelve-step program. The appellant also completed a substance abuse program in prison in order to help her gambling addiction and completed vocational training in the graphic arts industry because her career in accounting has been ruined. The appellant had never been in trouble with the law prior to committing these crimes and has not gambled since February 2003. She stated that she owed one hundred fifty thousand dollars in restitution in Michigan and that she would begin paying that restitution when she was paroled. She stated she would be willing to pay restitution in Tennessee, had disgraced her family, and would never do anything like this again.

On cross-examination, the appellant testified that she began gambling regularly in 1998 and that gambling began to control her life in 1999. At that time, the appellant lived in Michigan and began going to casinos every couple of days. She stopped paying her bills, began borrowing money from credit cards, and began writing checks at casinos. The appellant was employed with Sherr Development in Michigan and began stealing money from the company in June 2000. She stole eighty-five thousand dollars, was guilt-ridden about what she had done, and quit working for Sherr Development in December 2000 before the thefts were discovered. The appellant left Michigan to get away from the gambling environment and moved to Tennessee. About four months after moving to Tennessee, the appellant began visiting casinos. A few months later, she began stealing money from Kistler McDougall. The appellant quit working for Kistler McDougall and went to Florida. The appellant was apprehended when a police officer stopped her while she was driving in Gulfport, Mississippi. The appellant stated that her passenger had drugs in the car and that she was convicted of a misdemeanor drug offense in Mississippi. After serving time in confinement there, the appellant was extradited to Michigan to face embezzlement and forgery charges. In 2002, the appellant was convicted of four felonies for stealing from Sherr Development. The appellant spent four months in jail and was to serve five years on probation. However, she violated probation in 2003 by embezzling forty-five thousand dollars from FiberClass Siding in Wixom, Michigan.

On redirect examination, the appellant testified that she had been in prison for two and one-half years and realized how important her family was to her. She said that "the casino and gambling and all of that just is not important" and that she would be returned to prison immediately if she

violated her Michigan parole. In 2000, the appellant met with a psychologist about her gambling problem but stopped seeing him because "there were some things that he had said to me, that I thought were inappropriate to my therapy, about my gambling." The appellant then saw a medical doctor to get medication for her depression and gambling problem, but she did not see another psychologist.

According to the appellant's presentence report, the then forty-three-year-old appellant was not married, had no children, and graduated from Walsh College with a bachelor of arts degree in accounting in 1998. In the report, the appellant described her physical health as good but said she suffered from migraine headaches and psoriasis. She also described her mental health as good but said she took medication for depression. The appellant denied using alcohol or illegal drugs but said that her parents were alcoholics and that she had a dysfunctional childhood. The appellant reported that she attended a substance abuse program while in prison in order to help her with her gambling addiction and completed a graphic arts course in July 2005. The report shows that in March 2002, the appellant was convicted of two counts of uttering and publishing and two counts of forgery in Michigan and received a five-year sentence for each conviction. In April 2003, the appellant was convicted of embezzlement in Michigan and received a one-year, eleven-month to five-year sentence. Although the appellant admitted having a misdemeanor drug conviction in Gulfport, Mississippi, the conviction could not be verified in the presentence report due to problems after Hurricane Katrina.

In determining the manner of service of her sentence, the trial court noted that as a Range II offender, the appellant was not entitled to a presumption that she is a favorable candidate for alternative sentencing. The court stated that confinement was necessary in order to deter others likely to commit similar offenses and that less restrictive measures had been attempted in other jurisdictions and had been unsuccessful. The court concluded that the appellant's "failure to complete the probation due to new convictions for the same exact offenses lead this Court to believe additional efforts through alternative sentencing would not be fruitful." It stated that the appellant was not an appropriate candidate for alternative sentencing and held that she should serve her sentence in confinement. Regarding consecutive sentencing, the trial court noted that the appellant had stolen more than one hundred thirty thousand dollars in three years in order to support a gambling habit and had five prior felony convictions resulting from thefts from two other employers. It determined that the appellant "is a professional criminal whose record of criminal activity is extensive" and ordered that she serve her sentence in this case consecutively to her Michigan sentences.

II. Analysis

The appellant claims that the trial court should have ordered a sentence of confinement followed by probation. In support of her argument, she contends that she does not have a long history of criminal conduct, that total confinement is not justified by the need to provide an effective deterrent, and that "embezzlement from her employer, while reprehensible, is not the type of crime for which total incarceration is required to avoid depreciating its seriousness." While she

acknowledges that she has committed similar crimes, she argues that this "does not justify a sentence of total incarceration in light of the record as a whole, the life she led prior to her crimes, and the context in which she committed the crimes." She also contends that she has accepted responsibility for her actions and has sought treatment, demonstrating her potential for rehabilitation. Regarding consecutive sentencing, the appellant contends that the trial court should have ordered that she serve her sentence concurrently with her Michigan sentences because she is not a professional criminal and does not have an extensive criminal history. The State contends that the trial court properly sentenced the appellant. We agree with the State.

When an appellant challenges the length, range, or manner of service of a sentence, this court conducts a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). However, this presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In the event that the record fails to demonstrate such consideration, review of the sentence is purely de novo. Id. In conducting our review, this court must consider (1) the evidence, if any, received at trial and at the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancement factors; (6) any statements made by the appellant on her own behalf; and (7) the appellant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; see also Ashby, 823 S.W.2d at 168. The burden of showing that a sentence was improper is on the appellant. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

A. Split Confinement

Tennessee Code Annotated section 40-35-102(5) provides that only "convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration." A defendant who does not fall within this class of offenders and who is "an especially mitigated or standard offender convicted of a Class C, D or E felony is presumed to be a favorable candidate for alternative sentencing options." Tenn. Code Ann. § 40-35-102(6) (2003). Furthermore, "[t]he trial court must presume that a defendant sentenced to eight years or less and not an offender for whom incarceration is a priority is subject to alternative sentencing and that a sentence other than incarceration would result in successful rehabilitation." State v. Byrd, 861 S.W.2d 377, 379-80 (Tenn. Crim. App. 1993) (citation omitted); see also Tenn. Code Ann. § 40-35-303(a) (2003).

Because the appellant pled guilty as a Range II offender, she is not entitled to a presumption of favorable candidacy for alternative sentencing. In any event, considerations for a sentence of confinement can be found in Tennessee Code Annotated section 40-35-103(1), which provides for confinement when

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

See also State v. Hooper, 29 S.W.3d 1, 5 (Tenn. 2000).

Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence was imposed. Tenn. Code Ann. § 40-35-103(2), (4). Further, "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." Tenn. Code Ann. § 40-35-103(5). A defendant with a long history of criminal conduct and "evincing failure of past efforts at rehabilitation" is presumed unsuitable for alternative sentencing. Tenn. Code Ann. § 40-35-102(5).

We conclude that the record in this case amply supports the trial court's denial of split confinement. The record reflects that the appellant stole a large amount of money from an employer in Michigan in 2000 and fled to Tennessee in 2001, where she again stole a large amount of money from an employer. Before the theft could be discovered, she fled Tennessee and was apprehended in Mississippi, where she was convicted of a misdemeanor drug offense. She was extradited to Michigan, convicted of four felonies there in March 2002, served some time in prison, and was released on probation. In early 2003, the appellant stole a large amount of money from a third employer and was convicted of her fifth felony in Michigan. Although the appellant claimed at her sentencing hearing that she was "guilt-ridden" about what she had done, she failed to seek serious treatment for her gambling addiction until after she had stolen over two hundred thousand dollars from three companies and was apprehended. The trial court obviously believed that the appellant's potential for rehabilitation was poor. While the appellant has admitted her guilt, we agree with the trial court and believe this series of events reflects very poorly on her potential for rehabilitation. Moreover, the appellant admitted that she committed one of the crimes while she was on probation. Therefore, the trial court correctly considered that measures less restrictive than confinement had recently been applied unsuccessfully to the appellant.

The trial court also denied the appellant's request for split confinement because "employees are watching for the outcome of this case [and] . . . confinement is necessary to provide an effective deterrence to others likely to commit similar offenses. In State v. Hooper, 29 S.W.3d 1, 10-12

(Tenn. 2000), our supreme court specifically noted five factors for consideration when denying probation solely upon the basis of deterrence:

> (1) Whether other incidents of the charged offense are increasingly present in the community, jurisdiction, or in the state as a whole.
>
> (2) Whether the defendant's crime was the result of intentional, knowing, or reckless conduct or was otherwise motivated by a desire to profit or gain from the criminal behavior.
>
> (3) Whether the defendant's crime and conviction have received substantial publicity beyond that normally expected in the typical case.
>
> (4) Whether the defendant was a member of a criminal enterprise, or substantially encouraged or assisted others in achieving the criminal objective.
>
> (5) Whether the defendant has previously engaged in criminal conduct of the same type as the offense in question, irrespective of whether such conduct resulted in previous arrests or convictions.

This list is not exhaustive, and "[a]dditional factors may be considered by the sentencing court, provided that (1) the sentencing court states these additional factors on the record with specificity, and (2) the presence of these additional factors is supported by at least some proof." Id. at 12. Although the sentencing statute only refers to the need for general deterrence, specific deterrence is another factor which may be considered. Id.

The appellant admitted that her crime was the result of intentional conduct. She also has previously engaged in criminal conduct of the same type as the offense in question. Thus, specific deterrence is needed in this case. Tom Newhouse testified that two hundred fifty other employees were watching this case, and the trial court determined that confinement was necessary to deter others from committing similar offenses. We conclude that the existence of these factors supports the trial court's denial of split confinement based upon the need for deterrence. There is ample evidence in the record to support the trial court's denying the appellant's request for split confinement.

B. Consecutive Sentencing

Tennessee Code Annotated section 40-35-115 contains the discretionary criteria for imposing consecutive sentencing. In this case, the trial court imposed consecutive sentencing on the basis that "[t]he defendant is a professional criminal who has knowingly devoted such defendant's life to

criminal acts as a major source of livelihood" and "[t]he defendant is an offender whose record of criminal activity is extensive." Tenn. Code Ann. § 40-35-115(b)(1), (2). "Whether sentences are to be served concurrently or consecutively is a matter addressed to the sound discretion of the trial court." State v. Adams, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997). At the time of the appellant's sentencing hearing, she had five prior felony convictions and one misdemeanor drug conviction. This criminal history alone provides a sufficient basis for upholding the trial court's order of consecutive sentencing.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

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NORMA McGEE OGLE, JUDGE